82-990

No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DR. JACK L. MARVIN,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Court of Appeals erroneously sustained a conviction for aiding and abetting when the instruction on that count incorporated an erroneous instruction on scienter which the Court held required reversal of the conviction under the substantive count?

II. Whether the Court of Appeals erroneously refused to reverse a conviction which may have rested upon an instruction to the jury that the Court itself held was grounds for reversal?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

DR. JACK L. MARVIN,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The October 14, 1982, memorandum of the Court of Appeals, denying the petition for rehearing, is not reported. It appears in the Appendix, infra, at 1a.

The September 3, 1982, opinion of the Court of Appeals is reported. 687 F.2d 1221 (8th Cir. 1982). It appears verbatim in the

Appendix, infra, beginning at 2a.

The October 29, 1981, unreported opinion of the district court appears in the Appendix, infra, beginning at 34a.

JURISDICTION

(i) The U.S. Court of Appeals rendered the judgment to be reviewed on September 3, 1982.

(ii) The U.S. Court of Appeals denied a petition for rehearing on October 14, 1982.

(iii) Section 1254(1), Title 28, U.S. Code vests jurisdiction in this Court to review this case by certiorari.

STATUTES INVOLVED

The aiding-and-abetting statute, 18 U.S.C. § 2, provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

The underlying substantive statute, 7 U.S.C. § 2024(b), provides:

> (1) Subject to the provisions of paragraph (2) of this subsection, whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons or authorization cards are of a value of $100 or more, be guilty of a felony ...

STATEMENT OF THE CASE

Petitioner Dr. Jack L. Marvin is a licensed Missouri chiropractic physician. He has practiced his profession in the Kansas City, Missouri area for approximately twenty-five years. (App. 4a). Dr. Marvin was convicted in federal district court[1] for violations of 7 U.S.C. §2024(b). The statute prohibits certain acquistions of food stamps. One count involved the illegal acquisition and possession of food stamp coupons. The remaining two involved aiding and abetting one Anthony R. Astorino in violating the same statute. On appeal, the Eighth Circuit reversed the acquiring and possessing count, but affirmed the conviction as to two aiding and abetting courts. (App. 4a).

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1 The District Court had jurisdiction under 18 U.S.C. § 3231.

The core of the government's case was the testimony of one paid government informant Jack Clark. Mr. Clark attempted to sell to various individuals food stamps which were were supplied by the government. The government alleged and attempted to prove, primarily through Jack Clark's testimony, that Dr. Marvin purchased food stamps on one occasion and arranged and/or bankrolled three other transactions between Jack Clark and one Anthony R. Astorino.

The evidence at trial revealed that on March 10, 1980, Jack Clark and Dr. Marvin did discuss food stamps at Dr. Marvin's clinic.[2] The government's proffer was that a sale was consummated. Dr. Marvin denied that he entered

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2 Dr. Marvin had treated members of Jack Clark's family for a long period of time. He had known Jack since his early childhood. Thus Clark was readily allowed into the Marvin clinic.

into any such transaction. The conviction based on these events was reversed by the Eighth Circuit.

The two Clark/Astorino transactions which led to Dr. Marvin's conviction on two counts of aiding and abetting occurred on April 9, 1980 and May 22, 1980. Astorino, whose wife was a receptionist at the Marvin office, did purchase food stamps from Jack Clark on April 9, 1980. The government contended that Dr. Marvin arranged and financed the sale. Dr. Marvin maintained that he played no role in the transaction. The only evidence linking Dr. Marvin to the May 22, 1980 purchase by Rick Astorino was an alleged phone call between Dr. Marvin and Clark which was initiated by Clark.

Mrs. Astorino pleaded guilty to a misdemeanor and had no actual confinement.

Rick Astorino was tried by the same district court separately from Dr. Marvin who had a jury trial. The Astorinos did not pursue appeals on the questions presented here.

REASONS FOR GRANTING THE WRIT

This case presents important and recurring questions in the application of the federal criminal law which are currently unresolved by this Court and on which there is both confusion and dispute among the Courts of Appeal. On each question presented, the decision below is in conflict with the rule in the majority of the Courts of Appeal and with the reasoning, if not the holdings, of decisions by this Court. The result of the error below is that a respected physician in his community, without previous criminal conviction, is faced with imminent incarceration and the destruction of his professional practice.

I. AFTER CORRECTLY REVERSING THE TRIAL COURT ON THE SUBSTANTIVE COUNT FOR ITS ERROR IN FAILING TO CONSTRUE 7 U.S.C. §2024(b) AS REQUIRING KNOWLEDGE THAT TRANSACTING IN FOOD STAMPS WAS ILLEGAL, THE COURT BELOW ERRED IN NOT SIMILARLY REVERSING THE CONVICTIONS FOR AIDING AND ABETTING SINCE THE TRIAL COURT'S CONSTRUCTION OF THE STATUTE AS SET FORTH IN THE INSTRUCTIONS ALLOWED THE JURY TO CONVICT THE DEFENDANT FOR AIDING AND ABETTING A NON-CRIMINAL ACT.

A. The trial court's aiding and abetting instruction to the jury was erroneous since it did not require the jury to find that the principals knew transacting in food stamps was illegal.

This case squarely presents the question of whether a person can be convicted of aiding and abetting the commission of a crime when the

jury was erroneously instructed as to an element in the substantive crime. Defendant was found guilty on one count of unlawfully acquiring and possessing food stamps in violation of 7 U.S.C. §2024(b) (Count I) and two counts of aiding and abetting this offense (Counts II and III).[3]

7 U.S.C. §2024(b) in relevant part states:

> §2024. Violations and enforcement--Coupon redemption.
>
> (b)(1) Subject to the provisions of paragraph (2) of this subsection, whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons or authorization cards are of a value of $100 or more, be guilty of a felony . . ..

---

[3] The aiding and abetting offense was charged under 18 U.S.C. §2(a). The defendant's trial was severed from trial of his co-defendants.

At trial the district court held that the "knowing" requirement as set forth in the statute required only that the defendant know he was acquiring or possessing food stamps. It did not require scienter that the acquisition or possession of food stamps was unlawful. The jury was instructed accordingly not only with respect to Count I but Counts II-IV as well.[4]

On appeal, the Eighth Circuit reversed the conviction on the substantive count, holding that an essential element of the criminal offense is knowledge that the acquisition and possession of the food stamps was illegal. The simple knowledge that a defendant possessed or acquired food stamps was not sufficient to constitute a violation. United States v. Marvin, 687 F.2d 1121, 1127 (8th Cir. 1982).

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[4] The jury acquitted the defendant on Count IV.

See also United States v. O'Brien, 686 F.2d 850 (10th Cir. 1982).

On this basis, the convictions on the aiding and abetting counts should also have been reversed since the trial court's instructions on the elements of §2024(b) omitted any requirement that the jury find the principal specifically intended to violate the law. Without this finding there could be no finding that §2024(b) was violated. Without the establishment of such a violation there could be no conviction for aiding and abetting.

The Eighth Circuit, however, sustained defendant's conviction on the aiding and abetting counts despite its holding that the jury had not been properly instructed as to an essential element (scienter) of the underlying offense. In essence, the Court held that a

proper charge to the jury as to the scienter of the defendant was all that was required in order to sustain the convictions on the aiding and abetting counts. This decision however is erroneous, in conflict with the principles announced by this Court, and in conflict with the rule established in other circuits.

As had been held, aiding and abetting alone does not state a crime. United States v. Oates, 560 F.2d 45 (2nd Cir. 1977). Rather, proof of the existence of the underlying crime is an essential element of any conviction for aiding and abetting the violation of a law. United States v. Raper, 676 F.2d 841 (D.C. Cir. 1982); United States v. Indelicato, 611 F.2d 376 (1st Cir. 1979); United States v. Cades, 495 F.2d 1166 (3rd Cir. 1974); United States v. Rodgers, 419 F.2d 1315 (10th Cir. 1969).

The government must then prove each element of the underlying offense in order to sustain a conviction for aiding and

abetting. See, e.g., Standefer v. United States, 447 U.S. 10 (1980). Without such a rule, an accomplice may be convicted of aiding and abetting an activity not shown to be unlawful, a result this Court has found to be impermissible. Shuttlesworth v. Birmingham, 373 U.S. 262 (1963).

The rule that the government must establish the existence of the underlying offense in aiding and abetting cases is not controversial. The Eighth Circuit itself has recognized this requirement on elements other than the scienter of the principal. United States v. Barker, 542 F.2d 479 (8th Cir. 1976). See also Manning v. Biddle, 14 F.2d 518 (8th Cir. 1926).

In the case at bar, however, the Eighth Circuit apparently drew exception to this well-settled rule with respect to scienter. This exception is illogical. It was not reasoned

out in the opinion below. Without a finding that the principal acted with proper scienter, the underlying crime cannot be established. The aiding and abetting charge must then automatically fall. Cf. Standefer v. United States, 447 U.S. 10 (1980) (government must prove violation of underlying offense).

Other circuits recognize the necessity of reversing a conviction for aiding and abetting when the government has failed to prove that the principal acted with the mental state necessary for conviction of the underlying crime. In United States v. Cleary, 565 F.2d 43 (2nd Cir. 1977), cert. denied, 435 U.S. 915 (1978), a defendant was convicted of aiding and abetting the willful misapplication of bank funds by a bank officer. The trial court instructed the jury that the principal's intent to defraud the bank was not an element of the crime. On appeal, the Second Circuit held that intent to defraud was an element of

the principal offense. It then held that because the jury had not been properly instructed on the scienter element of the principal offense, defendant's conviction for aiding and abetting that offense must be reversed. Id. at 46.

Similarly, in United States v. Tashjian, 660 F.2d 829 (1st Cir. 1981), cert. denied, 102 S.Ct. 681 (1981), a defendant was convicted of aiding and abetting the fraudulent transfer of property in contemplation of bankruptcy, in violation of 18 U.S.C. §152 and §2. The trial court had failed to instruct the jury that the principal's intent to defraud was an essential element of defendant's conviction. The government failed to prove that the principal had a fraudulent intent. The First Circuit held that intent to defraud was an essential element of the principal offense, and that it had not established that the principal offense had been committed.

It concluded that "if Weiner [the principal] did not violate 18 U.S.C. §152. . .it follows that. . .[the accomplice could not have]. . . aided and abetted the alleged violation of §152. We therefore reverse. . ." Id. at 842. See also Giragosian v. United States, 349 F.2d 166 (1st Cir. 1975).

Despite the fact that reversal of petitioner's conviction is support by the weight of authority, the court below chose to join the Third Circuit. United States v. Bryan, 483 F.2d 88 (3rd Cir. 1973) (en banc), had held that scienter of the principal in the substantive crime was not an element of aiding and abetting. Bryan upheld a conviction for aiding and abetting the theft of liquor in violation of 18 U.S.C. §659. At a bench trial, the principal was acquitted on the express ground that he lacked the requisite intent. The court held that absence of an element of the underlying crime "does not absolve Bryan

of guilt for his participation in the crime." Id. at 94.

That the holdings of the Third Circuit in Bryan and of the court below were in error is strongly implied by two decisions of this Court. In Shuttlesworth v. Birmingham, 373 U.S. 262 (1963), the Court reversed a conviction for aiding and abetting the violation of an ordinance prohibiting parading without a permit. This court held that the principal's conduct was protected by the First Amendment. This Court then reversed defendant's aiding and abetting conviction, holding that it was not unlawful to aid and abet a non-criminal act. Id. at 265. Obviously, until the government has proved all elements of an offense, it has not proved that an act is criminal. More recently, Standefer v. United States, 447 U.S. 10 (1980), held that an accomplice may be convicted even though the principal was acquitted in a

separate trial. The Court emphasized that in the aiding and abetting trial the jury was required to find that the Government had proved all elements of the underlying crime. Id. at 13, n.6. It was on this basis that Shuttlesworth was distinguished. Id. at 20, n. 14. The Court concluded by saying "petitioner received a fair trial at which the Government bore the burden of proving beyond a reasonable doubt that. . .[the principal was guilty of the underlying crime]. . .He was entitled to no less." Id. at 26. Similarly, here the conviction cannot stand without the jury's finding the principal was guilty of the substantive offense with the requisite scienter. Therefore, this petition should be granted.

B. The trial court's aiding and abetting instruction to the jury was erroneous since it did not require, or was at best ambiguous in requiring, that in

> order to convict the defendant of aiding and abetting the jury must find that the defendant knew that transacting in food stamps was illegal.

The court below held that a proper instruction on scienter had been issued on the aiding and abetting count despite the fact that the trial court explicitly stated the contrary. (App. 47a). In the trial court's view, the jury was not required to find the defendant had specific intent in order to convict on the aiding and abetting charge, since specific intent was not required on the substantive charge. On this theory the trial court rejected defendant's proposed instructions calling for a specific intent charge on the aiding and abetting counts. (Id.)

Ignoring the trial court's characterization of its own instruction, the court below instead affirmed the aiding and abetting conviction relying on a lone instruction issued by the trial court on this issue. The trial court had instructed:

> "An act is done 'willfully' if done voluntarily and intentionally, and with specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law." TR.at 453.

This instruction, according to the Eighth Circuit, saved the aiding and abetting conviction since unlike the trial court's charge on the substantive count, it ostensibly required that the jury find the defendant knew he was breaking the law. United States v. Marvin, 687 F.2d at 1228.

The Eighth Circuit's construction of the trial court's instruction is out of context and is not defensible. It is axiomatic that

trial instructions must be reviwed as a whole. United States v. Palmeri, 630 F.2d 192 (3rd Cir. 1980), cert. denied, 101 S.Ct. 1484 (1980). Here the instructions indicated that intent to violate the food stamp law was not a part of the substantive crime. The jury had been instructed that transacting in food stamps was simply unlawful. Thus the logical understanding the jury would have of the aiding and abetting instruction was that willfully aiding persons transacting in food stamps was similarly unlawful. Without a clarifying instruction it is unrealistic to assume that the jury would understand that in order to convict on the substantive count knowledge of illegality was not required while on the aiding and abetting count it was. This is particularly evident since the trial court had explicitly indicated that the requisite knowledge on the substantive and aiding and abetting charges was the same. Immediately

after reading 18 U.S.C. §2(a), the trial court instructed:

> "In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and intentionally." TR. at 52 (emphasis addedd).

This instruction contains the exact same language used by the trial court in its instruction on the substantive offense. It is the exact language, moreover, which led the Eighth Circuit to reverse the substantive count as not indicating proper scienter. United States v. Marvin, 687 F.2d at 1228.

Given this context, the instruction cannot be fairly said to require the jury to find the defendant aided a principal's transacting in food stamps knowing such to be illegal. At best the instruction is confusing. Thus in holding that the conviction was saved, the Eighth Circuit is in error as well as in

conflict with the Fourth Circuit in United States v. Walker, 677 F.2d 1014 (4th Cir. 1982) (correct instruction does not cure confusion already created), with the Seventh Circuit in United Staes v. Barclay, 560 F.2d 812 (7th Cir. 1977)(use of term "specific intent" not sufficient unless defined and its applicability to case made clear), and with the First Circuit in Polansky v. United States, 332 F.2d 233 (1st Cir. 1964)(correct instruction does not cure confusion already created). It is also inconsistent with the rule established in this Court that the jury cannot be expected to disregard a judge's bad instructions on the law. Bollenbach v. United States, 326 U.S. 607 (1946). The petition should therefore be granted and the conviction reversed.

II. EVEN IF THE TRIAL COURT'S AIDING AND ABETTING INSTRUCTION WAS CORRECT, THE CONVICTIONS AS TO COUNTS II AND III SHOULD STILL BE REVERSED SINCE THE JURY'S FINDING OF

GUILTY ON THESE COUNTS MAY HAVE RESTED UPON THE INSTRUCTION ON THE SUBSTANTIVE CHARGE THAT THE COURT BELOW FOUND TO BE DEFECTIVE.

Because the trial court's instructions were ambiguous as to whether petitioner was accused in Counts II and III of violating §2024(b) or of aiding and abetting its violation, the reversal on the substantive conviction necessarily requires reversal on the aiding and abetting conviction. Thus, even if it is assumed that the instructions of the trial court on the elements of aiding and abetting were correct, the conviction of petitioner on Counts II and III of the indictment should be reversed since, as the appellate court held, the instructions on the elements of §2024(b) were fatally defective. It is well settled that if a conviction may have rested on multiple grounds and one of those grounds was improper and reversible then the conviction must be reversed and

remanded. United States v. Donnelly, 179 F.2d 227 (7th Cir. 1950).

The ambiguity of the court's instructions is manifest. The court initially instructed the jury that "[t]he defendant, Jack L. Marvin, is charged in four counts of violations of 7 U.S.C. §2024(b). . .Four essential elements are required to be proved in order to establish the offenses charged in the indictment." TR. at 449. The court then gave the instruction which was reversed as to Count I by the court below. The court did not instruct the jury that Counts II- IV were based on a theory of aiding and abetting or that the elements needed to convict were different for the first count than for the latter ones. Instead, the jury was instructed that the same elements were necessary to convict on all four counts and that intent to violate the law was not one of those elements.

This erroneous impression was reinforced by the indictment, which was included in the instructions by the court and requested by and given to the jury for use during deliberation. TR.445-449, 469. With the exception of amounts, places, and dates, the only substantive difference in the counts is that Count I names only Di Marvin and cites only 7 U.S.C. §2024(b). The latter counts name defendant and Anthony Astorino. They cite §2024(b) and 18 U.S.C. §2. Clearly, from the indictment alone, it is implausible that the jury understood that the latter counts required proof of fundamentally different elements than the first count. Thus, the indictment served to compound the earlier errors.

The trial court's instructions on aiding and abetting did not rectify these earlier errors. These instructions stated only that: "in a case where two or more persons are charged with the commission of a crime, the

guilt of any may be established without proof that he personally did every act constituting the offense charged." The court then simply defined the elements of aiding and abetting. It did not specifically refer to any count or exclude any count in its instruction. Thus the most natural understanding would be that aiding and abetting was an alternative basis for conviction on Counts II, III and IV.

Under these circumstances, it is impossible to say on what theory defendant's convictions on Count II and III rested. Under the instructions it was permissible for the jury to conclude that they could convict on either of two theories. Since under the erroneous instruction of the trial court it was not necessary to find that defendant had the specific intent to violate the law, the jury could have convicted on Counts II and III on this basis. Thus convictions on those counts must be reversed.

Notwithstanding the above, the court below sustained defendant's conviction, holding that "it is clear in context that Marvin was not charged in these two counts with acquiring or possessing food stamps himself, but rather with helping someone else to do so." United States v. Marvin, 687 F.2d at 1228. This holding was based on the understanding that the only source of confusion was the indictment. Id.

As has been shown, that is simply not the case. Confusion and ambiguity infest the whole of the trial court's instructions. It is fundamental that "a conviction ought not to rest on the equivocal direction of a court on a basic issue." Bollenbach v. United States, 326 U.S. 607, 613 (1946). It is not reasonable to assume that the jury was able to determine which part of a contradictory charge was correct. Polansky v. United States, 332 F.2d 233, 236 (1st Cir. 1964). Instead, it is the duty of the court to reverse when it is

impossible to tell which of two contradictory instructions were followed. Mills v. United States, 164 U.S. 644 (1897). The decision of the court below departs from these fundamental and broadly recognized principles and should therefore be reversed.

CONCLUSIONS

For the reasons set out, the Court should grant the petition for a writ of certiorari and set this case for briefing and argument.

Respectfully submitted,

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Dated: December 13, 1982

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 81-2255

United States of America,	*	
Appellee,	*	
	*	On Appeal from the United States District Court for the Western District of Missouri.
v.	*	
Jack L. Marvin,	*	
Appellant.	*	

Filed, October 14, 1982

Before McMILLIAN, Circuit Judge, STEPHENSON, Senior Circuit Judge, and ARNOLD, Circuit Judge.

The petition for rehearing is denied. The conviction on Count I is reversed in its entirety. The convictions on Count II and III are affirmed.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 81-2255

United States of America,	*	
Appellee,	*	
	*	Appeal from the United States District Court for the Western District of Missouri.
v.	*	
Jack L. Marvin,	*	
Appellant.	*	

Submitted: April 15, 1982

Filed: September 3, 1982

Before McMILLIAN, Circuit Judge, STEPHENSON, Senior Circuit Judge, and ARNOLD, Circuit Judge.

ARNOLD, Circuit Judge.

Defendant Jack L. Marvin was convicted

of three food-stamp offenses: one count of unlawfully acquiring and possessing United States Department of Agriculture food-stamp coupons in violation of 7 U.S.C. §2024(b), and two counts of aiding and abetting one Anthony R. Astorino in violating the same statute.[1] The District Court[2] sentenced Marvin to one year's imprisonment, with all but 90 days suspended, plus two years' probation to follow the 90 days of incarceration. This portion of the sentence was imposed concurrently on all three counts. In addition, a fine of $5,000 was imposed on Count I.

The principal question presented is what state of mind a person must have in order to be guilty of violating 7 U.S.C. §2024(b). The Government contends, and the District Court held, that if a defendant knows that what he has acquired or is possessing is food stamps, and if the acquisition or possession is not authorized by law, a crime has been committed,

[1] For text of footnotes see infra, 29a.

even if the defendant is unaware that his acquisition or possession is unauthorized. Defendant argues, on the other hand, that the District Court should have instructed the jury that it could not convict him of the substantive offense unless it found that he knew he was violating the law. We agree and reverse the conviction on Count I. We affirm as to the two aiding-and-abetting counts, however, because as to them a proper instruction was given. The sentence imposed therefore remains intact, except for the $5,000 fine on Count I.

I.

Prior to his conviction, Marvin had been a practicing chiropractor for approximately 25 years, primarily in Kansas City, Missouri. As part of its crackdown on food-stamp fraud in the Kansas City area, the United States Department of Agriculture enlisted the aid of Jackie Clark in some of

its investigation.[3] Clark knew Dr. Marvin, who had treated several members of Clark's family for a number of years. Working as an investigative aide for the government, Clark had assisted in about 42 cases concerning food stamp fraud and abuse involving more than 60 individuals.

The basic procedure used by the government in its investigations consisted of supplying Jackie Clark with various amounts of food stamps (usually from $500 to $1,000) and then allowing Clark to solicit buyers of the stamps or coupons at less than their face value. Defendant Marvin was allegedly involved on at least four occasions when such illegal transactions occurred. In the first of these transactions, dated March 10, 1980, Clark was given $500 in food stamps by investigators from the Agriculture Department. He entered defendant's chiropractic clinic and later returned to the federal agents with $200 in cash. This transaction was the subject of Count I and the only

one in which Marvin allegedly purchased the food stamps directly from Clark.

Other transactions occurred on April 9, 1980, May 22, 1980, and July 14, 1980, in which Marvin allegedly acted as an aider and abettor by either arranging the transactions or providing the necessary money for the purchases of the food coupons. The purchases on these dates constituted the substance of Counts II, III, and IV, respectively. Investigating agents conducted audio or video surveillance of the April 9 and May 22 transactions and also of a purchase of coupons on August 6, 1980, which was not the subject of any counts of the indictment. Much of the government's evidence, however, depended on the testimony of investigative aide Jackie Clark and, to a lesser degree, on that of several federal agents who supervised Clark's actions.

On appeal, defendant Marvin raises a number of issues as grounds for reversal of his convictions. He contends that the District Court erred in the following respects: (1) refusing to instruct the jury on the issue of specific intent as a requirement for a violation of 7 U.S.C. §2024(b); (2) denying Marvin's motion to dismiss the indictment because it was not sufficiently specific and rejecting his argument that the statute is unconstitutionally vague on its face and as applied; (3) admitting evidence of a food-stamp transaction occurring on August 6, 1980; (4) admitting into evidence portions of tape-recorded conversations of April 9, 1980, and May 22, 1980; (5) limiting Marvin's cross-examination of Jackie Clark; (6) overruling defendant's objections to the prosecutor's closing argument; (7) denying his motions for acquittal; and (8) denying defendant's motion to dismiss based upon alleged improper government conduct in violation of the Due Process Clause of the Fifth Amendment.

II.

Section 2024(b) of Title 7 of the United States Code, in pertinent part, provides:

> [W]hoever knowingly uses, transfers, acquires . . . or possesses [food] coupons . . . in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons are of a value of $100 or more, be guilty of a felony. . ..

Defendant Marvin argues that the language of the statute, reflected in the indictment,[4] required a jury instruction on specific intent. The District Court refused to give such an instruction proposed by the defendant and, instead, submitted to the jury an instruction offered by the government that did not require Marvin to possess the specific intent to violate the statute.[5] Defendant contends that this was error and that the word "knowingly" in §2024(b) required the government to prove that he knew his actions

were in violation of the law. We must agree.

In United States v. Marshall, No. 81-2027 (8th Cir. August 4, 1982), in the course of affirming convictions under both 7 U.S.C. §2024(b) and 7 U.S.C. §2024(c), we remarked that "knowledge that the food stamps in question had been acquired in a manner not authorized by the Act . . . is an element of both offenses." Slip op. 3. In that case, however, both sides agreed that knowledge of unlawful acquisition had to be proved by the government. The District Court had so instructed the jury. The issue in this Court was whether certain evidence said by the government to be relevant on the issue of knowledge had been properly admitted. The statement in the Marshall opinion, therefore, though certainly not inadvertently made, is, strictly speaking, only dictum. We approach the issue anew, therefore, free of the compulsion of any binding authority. Neither side has cited an appellate opinion directly

in point, and we have found none.

The government argues that purchase of food stamps is only a malum prohibitum, a crime unknown to the common law, a so-called "regulatory offense," as to which no mens rea need be shown. Certainly there are such offenses. Congress may make an act criminal without regard to the actor's state of mind, subject of course to the Constitution. The question before us is simply one of statutory construction, whether Congress in 7 U.S.C. §2024(b) has chosen to exercise its power to disregard the maxim, Actus non facit reum, nisi mens sit rea. "[C]ourts obviously must follow Congress' intent as to the required level of mental culpability for any particular offense." United States v. Bailey, 444 U.S. 394, 406 (1980). In considering this question we are mindful that the crime involved is a felony, punishable by imprisonment in a federal penitentiary for up to five years. The normal purpose of the criminal law is to

condemn and punish conduct that society regards as immoral. Usually the stigma of criminal conviction is not visited upon citizens who are not morally to blame because they did not know they were doing wrong. If Congress wishes to depart from that norm, it may do so, but in general it must manifest its intention by "affirmative instruction." Morissette v. United States, 342 U.S. 246, 273 (1952). It may require less evidence to convince a court that such an "affirmative instruction" has been given when the crime involved is a "regulatory offense" with no common-law analogue. But the fact remains that we should not attribute to Congress the intention to make a felony out of a morally innocent act, unless Congress has clearly announced its desire to do so.

We begin as always with the words of the statute, quoted above. The government stresses that the adverb "knowingly" immediately

precedes the verbs "uses, transfers, acquires," etc., and is some distance away from the crucial clause, "in any manner not authorized by this chapter." It contrasts the language of §2024(c)[6] in order to show that Congress knew how to place the word "knowing" in such a way as to require unambiguously that a person know he is acting contrary to the law. Violation of §2024(c), the argument runs, requires specific intent,[7] but violation of §2024(b) does not. We disagree. The different placement of the words "knowingly" and "knowing" in the two subsections of the statute is too weak a reed to support the argument that Congress intended to displace a time-honored principle of criminal jurisprudence. For one thing, purely as a verbal matter, the word "knowingly" in subsection (b) may naturally be read to modify the entire remainder of the clause in which it appears, including the phrase, "in any manner not authorized," etc.

To read "knowingly" as having nothing to do with the phrase, "in any manner not authorized," is, we suppose, verbally tenable, but it is not the only meaning the words will bear, nor even, we think, the more natural one. Furthermore, the government's reading of the statute would make it easier to convict an ordinary citizen, like Dr. Marvin, for buying food stamps, than someone in the grocery business who would have some reason to be familiar with the regulations governing redemption of stamps for cash in an authorized fashion. The latter kind of person is the class to whom subsection (c) is directed. It is not apparent to us how that kind of distinction in the necessary elements of the two crimes would serve the purpose of Congress. In sum, though the reading of the statute suggested by the government is a verbally possible one, the statute is at most ambiguous. It does not amount to a clear statement that Congress wished to condemn a morally innocent act.

In some cases legislative history might be clear enough to resolve this sort of ambiguity in the government's favor, but that is not so here. Although the legislative history of §2024(b) is far from extensive, there is sufficient evidence to suggest that Congress desired that no one be convicted of violating this section without proof that he knew the unlawful character of his act. A 1977 House Committee Report describing the then-current rules and practice on penalties and sanctions under the Food Stamp Act of 1964, as amended, 7 U.S.C. §§2011 et seq., states:

> The Food Stamp Act of 1964, as amended and as implemented by Federal rules, provides for three groups of offenders and penalties, the first for recipients (and other persons) who knowingly use, transfer, acquire, alter, or possess food stamps or authorization to purchase documents illegally, or who use food stamps knowing that they have been used illegally; the second for retail food stores, wholesale food concerns, and meal services that violate rules governing the use and redemption of food stamps; and the third for state agencies that do not comply with program rules or administer the program in a

> manner deemed to be grossly negligent or fraudulent.

H.R. Rep. No. 95-464, 95th Cong., 1st Sess. 376 (1977), reprinted in 1977 U.S. Code Cong. & Ad. News 1978, 2305 (emphasis ours). The underscored language corresponds to §2024(b), and when pared to its essence, the meaning is clear: The Food Stamp Act provides for a particular group of offenders "who knowingly . . . acquire . . . or possess food stamps . . . illegally." Knowledge of the illegal nature of the transaction is, therefore, necessary for an individual to be subject to sanctions under the Act. Although the House Report described the state of the law prior to the enactment of the statute in its present form, the enacted statute did not make any significant changes in the language of the earlier provision.[8]

The District Court correctly stated in its instructions that the purpose of including the word "knowingly" in §2024(b) is "to insure that no one will be convicted for an act done because of mistake, or accident or other innocent reason." Limiting the word, however, to an interpretation that requires only knowledge that the items a person acquires or possesses are food-stamp coupons, effectively defeats that purpose. Under this view, a person who possesses food stamps in safekeeping for another or even in exchange for an item of clothing or for personal assistance would be subject to sanctions as long as he knew that the articles he had acquired were food stamps. We think that such was not the intent of Congress. The penalty provisions in the Food Stamp Act were added to reduce fraud and abuse

in the food-stamp program. See H.R. Rep. No. 95-464, 95th Cong., 2d Sess. 2, 3 (1977), reprinted in 1977 U.S. Code Cong. & Ad. News 1978, 1979. To require a lesser degree of intent would widen the net to include those who had no conscious desire to commit fraud nor even suspected that they might have done so. As stated in Morissette v. United States, supra, 342 U.S. at 263, "[t]he purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries." Though §2024(b) has no common-law origin, it seems clear that Congress, in this instance, did not intend to create what would be for all practical purposes a strict-liability crime. See United States v. Chicago Express, Inc., 235 F.2d 785, 786 (7th Cir. 1956).

We hold that the defendant's requested instruction no. 13, based on Devitt & Blackmar, Federal Jury Practice and Instructions §14:03 (3d ed. 1977), should have been given. The jury should have been told that the government had to prove "that the defendant knowingly did an act which the law forbids." D.R. 146 (the text of the refused instruction). This does not mean that the defendant must know, by chapter and verse, the precise law and regulation that forbid trafficking in food stamps for cash. But he must know that he was acting in violation of some law or regulation. Such a requirement places no unreasonable obstacle in the path of food-stamp prosecutions. Intent may often be inferred from circumstances, including, for example, purchases of stamps at a deep discount. Nor do we hold that the evidence here was insufficient to show the requisite intent. The fact remains, however, that under the instructions given the jury was

permitted to convict, and could have done so, without finding that when defendant bought food stamps on the occasion charged in Count I, he knew he was doing something that the law had forbidden. The conviction on Count I must therefore be reversed.

The same result does not follow, however, as to Counts II and III. Although those counts refer both to the substantive offense and to 18 U.S.C. §2, the aiding-and-abetting statute, it is clear in context that Marvin was not charged in these two counts with acquiring or possessing food stamps himself, but rather with helping someone else to do so. And the District Court instructed the jury that the defendant could not be convicted of aiding and abetting unless he acted "willfully," "and with the specific intent to do something the law forbids; that is to say, with bad purpose

either to disobey or to disregard the law." Tr. 452, 453. There was ample evidence to support a guilty verdict on Counts II and III under these instructions, which were clearly correct.

III.

We next consider Marvin's contentions that the indictment did not state an offense and that §2024(b) is unconstitutionally vague. Both of these issues can be disposed of easily after our conclusion that the language of the statute required an instruction on specific intent. The indictment, phrased in the words of the statute, is sufficient because, as we determined, the words of themselves "set forth all the elements necessary to constitute the offense intended to be punished . . .." United States v.

Carll, 105 U.S. 611, 612 (1881) (quoted in Goodloe v. Parratt, 605 F.2d 1041, 1045 (8th Cir. 1979)). Marvin's challenge to the constitutionality of §2024(b) on vagueness grounds also fails because of our narrow construction of the statute, if for no other reason. In addition, United States v. Goyette, 458 F.2d 992 (9th Cir. 1972), upheld the constitutionality of the predecessor to §2024(b). The minor differences in language between the two statutes are of no significance here.

Marvin raises a number of other issues which we briefly examine.

Defendant claims that the District Court abused its discretion in admitting into evidence the events of August 6, 1980. He testified at trial that he was not involved in the food-stamp transaction that occurred on that date. The evidence on the August 6

transaction consisted of the testimony of Jackie Clark, government agent Thorn, and defendant Marvin, and the government's videotape. Marvin was apparently the only person in a position to witness firsthand all the events of August 6, and the videotape did not record much of the transaction and was vague and ambiguous. We are nevertheless convinced that the court did not abuse its discretion in admitting the evidence as probative of the defendant's "knowledgeable participation" in the food-stamp purchases and as establishing a link between Marvin and his codefendants. See generally United States v. Adcock, 558 F.2d 397, 401-02 (8th Cir.) cert. denied, 434 U.S. 921 (1977). The District Court permissibly found that the probative value of the evidence was not "substantially outweighed by the danger of unfair prejudice . . .." Fed. R. Evid. 403. See generally United States v. Maestas, 554 F.2d 834, (8th Cir.), cert. denied. 431 U.S. 972 (1977).

Marvin next argues that the District Court should not have allowed into evidence portions of tape-recorded conversations of April 9, 1980, and May 22, 1980, because there was an insufficient showing of a criminal conspiracy. This argument lacks merit. There was substantial independent evidence indicating Marvin's extensive involvement in the conduct of co-defendant Anthony Astorino. The preponderance-of-the-evidence standard was clearly met to establish defendant's complicity in a conspiracy for the purpose of admissibility. See United States v. Bell, 573 F.2d 1040, 1043-44 (8th Cir. 1978).

Defendant alleges that the District Court improperly limited his cross-examination of the government's informant, Jackie Clark. He contends that he was not able to place before the jury (1) evidence of robberies and thefts Clark had committed prior to his employment with the government, (2) the fact that Clark had been treated at a mental hospital, and

(3) that John Eikel, a Missouri police officer, had filed a million-dollar lawsuit against Western Union concerning Clark, Clark, however, had never been charged with or convicted of any of the crimes allegedly committed prior to his work with the government. Also, his treatment for drug and alcohol addiction at the mental hospital had been voluntary, lasting only three days, and the lawsuit filed by the police officer did not name Clark as a defendant. On the other hand, Marvin was given ample opportunity to show the unsavoriness of Clark's character. He was permitted to cross-examine Clark on his three felony convictions, his drug use, and his reputation in the community. Several witnesses also testified as to Clark's alleged drug use, involvement in various crimes, and his propensity to lie. The District Court did not abuse its discretion in excluding the proffered evidence. See United States v. Bernhardt, 642 F.2d 251,

253 (8th Cir. 1981); United States v. Peltier, 585 F.2d 314, 332 (8th Cir. 1978), cert. denied, 440 U.S. 945 (1979).

Marvin next contends that it was error for the District Court to admit into evidence the tape-recorded conversations of April 9, 1980, and May 22, 1980, without a proper foundation. In United States v. McMillan, 508 F.2d 101, 104 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975), we set forth the following requirements for the introduction of such evidence:

> (1) That the recording device was capable of taking the conversation now offered in evidence.
> (2) That the operator of the device was competent to operate the device.
> (3) That the recording is authentic and correct.
> (4) That changes, additions or deletions have not been made in the recording.
> (5) That the recording has been preserved in a manner that is shown to the court.
> (6) That the speakers are identified.

> (7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

Defendant asserts that only requirements (5) and (6) were met in this case. The District Court specifically addressed this argument in its order of October 29, 1981, ruling on Marvin's motion for a new trial. Based on our review of the evidence in the record, we conclude that the court did not abuse its discretion in admitting the taped conversations.

Defendant alleges error in the District Court's overruling of his objection to certain statements made by the prosecutor during opening and closing arguments that, in effect, expressed the opinion that Marvin was lying.[9] The government argues that the comments of its counsel during closing argument were meant to reassure the jury that the prosecutor was offering no personal opinion on

the evidence despite suggestions to the contrary in defense counsel's closing arguments.[10] It is true that "the prosecutor has no authority to sit as a 'thirteenth juror'" and state a personal opinion on the defendant's guilt or innocence. United States v. Splain, 545 F.2d 1131, 1134 (8th Cir. 1976). Here, however, the prosecutor was primarily commenting on the defendant's testimony, and most of what was stated was "within the permissible degree of latitude afforded the prosecutor in responding to the argument of defense counsel." Ibid. Where there is substantial evidence of guilt, such remarks do not usually constitute reversible error. Ibid.

Finally, Marvin contends that the District Court erred in denying his motions for acquittal and in overruling his motion to dismiss based on the alleged improper conduct of the government. Both arguments are without merit. There was substantial evidence to

support the jury's verdict, taking the view most favorable to the government. See United States v. Lambros, 564 F.2d 26, 28 (8th Cir. 1977), cert. denied, 434 U.S. 1074 (1978). And the evidence in the record does not indicate any conduct on the part of the government that was so outrageous as to violate the Due Process Clause. See, e.g., Hampton v. United States, 425 U.S. 484 (1976); United States v. Quinn, 543 F.2d 640 (8th Cir. 1976).

IV.

The judgment as to Count I is reversed. As to Counts II and III, the judgment is affirmed. The sentence imposed by the District Court, except for the fine of $5,000 on Count I, remains undisturbed.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Footnotes from the Eighth Circuit's opinion in United States v. Marvin are reprinted in full below:

[1] The counts will be referred to in this opinion by the numbers used at trial, Counts I, II, and III. Count I is the substantive offense, and Counts II and III charge aiding and abetting. Defendant was acquitted of a third aiding-and-abetting count, Count IV, charging conduct on a later date. In the indictment as originally returned defendant was charged in Counts I, II, IV, and V. Defendant's trial was severed from that of two co-defendants, and the counts naming him were renumbered, I, II, III, and IV, respectively.

[2] The Hon. Russell G. Clark, Chief Judge, United States District Court for the Western District of Missouri.

[3] Clark had been referred to federal officials, including agents of the Organized Crime and Racketeering Section, United States Department of Justice, by officials in the Kansas City, Missouri, Police Department.

[4] Count I of the indictment states, in relevant part, that "Jack L. Marvin did knowingly acquire and possess United States Department of Agriculture food stamp coupons . . .in a manner not authorized by the provisions of Chapter 51, Title 7, United States Code and the regulations issued pursuant to said chapter . . .." D.R. 8.

[5] The District Court submitted the following instruction to the jury:

> The defendant, Jack L. Marvin, is charged in Counts I, II, III and IV of violations of 7 U.S.C. Section 2024(b), which provides in pertinent part:
>
> Whoever knowingly uses, transfers, acquires, . . . or possesses coupons . . . in any manner not authorized by this Chapter or the regulations issued pursuant to this Chapter shall, if such coupons are the value of $100 or more . . . be guilty of an offense against the laws of the United States. [sic]
>
> Four essential elements are required to be proved in order to establish the offense charged in the indictment.
>
> First: the act of acquiring or possessing the food stamp coupons.

> Second: the value of the food stamp coupons equaled or exceeded $100.
>
> Third: At the time the food stamp coupons were acquired or possessed, the defendant was not authorized to acquire or possess food stamp coupons in the manner acquired.
>
> Fourth: the act was done knowingly.

An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

The purpose of adding the word "knowingly" is to insure that no one will be convicted for an act done because of mistake, or accident or other innocent reason. Tr. 449-50.

[6] 7 U.S.C. §2024(c) provides in relevant part:

> Whoever presents, or causes to be presented, coupons for payment or redemption of the value of $100 or more, knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this chapter or the regulations issued pursuant to this chapter, shall be guilty of a felony . . ..

[7] And we have so held, in United States v. Miller, 543 F.2d 1221, 1223 (8th Cir. 1976), cert. denied, 429 U.S. 1108 (1977).

[8] Food and Agriculture Act of 1977, Pub. L. No. 95-113, §1301, 91 Stat. 913, 975.

9 During the course of his opening argument, the prosecutor stated: "Defendant is telling you a story, ladies and gentlemen, that doesn't fit the facts . . . the government submits to you that the defendant is lying to you . . .." Tr. 430.

In his closing argument, apparently in response to that of defense counsel, the prosecutor remarked:

> [L]et me mention at the outset, as [defense counsel] so vehemently responded, I'm not here in my personal capacity, ...I'm here representing the United States government and the belief of the government of what the evidence shows and the government believes that the evidence shows that the actions and the conduct of the defendant occurred as we put the evidence on, and the only result that you can reach in light of the defendant's testimony here in court to you is that he's wrong, whether you call it a lie or an error or mistaken, but he's wrong. It didn't occur the way he said it did.

Tr. 431.

10 During closing argument, defense counsel made the following comments:

> Am I going to judge this case by the statements of [prosecutor] who will stand up here and tell you that a fellow who's been a family doctor for 25 years is a liar . . ..
>
> When you hear him try to call Dr. Marvin a liar again, you ask him

> how come you put Jack Clark on the stand to lie. How come he lied to us, [prosecutor]. Do you want us to convict a man four times on a perjurer's testimony?
>
> * * * *
>
> . . . Dr. Marvin, he gets on the stand, he gets called a liar. That's the way he gets treated in this court, but that's all right according to the government.

Transcript of Defendant's closing argument, pp. 3-6.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	No. 81-00060-01-CR-W-4
JACK L. MARVIN,	)	
Defendant.	)	

ORDER

On June 26, 1981, defendant Jack L. Marvin was indicted along with Anthony R. Astorino and Clara June Astorino on charges that they knowingly did acquire and possess United States Department of Agriculture food stamp coupons having a composite value in excess of $100 in violation of Title 7 U.S.C. § 2024(b). In addition, defendant also was indicted on charges of aiding and abetting violations of Title 7 U.S.C. § 2024(b). All defendants filed motions for severance which were granted.

The charges against defendant are contained in a modified indictment which lists four counts. Count I charged defendant with

knowingly acquiring and possessing food stamps having a value in excess of $100. Counts II, III and IV charged defendant under Title 18 U.S.C. § 2 with aiding and abetting separate violations of Title 7 U.S.C. § 2024(b). Following deliberation, the jury returned a verdict of guilty on Counts I, II and III. Defendant was acquitted on Count IV.

This case is presently before the Court on defendant's motion for a new trial, or, in the alternative for judgment of acquittal, or for arrest of judgment. For the reasons stated below, the defendant's motion will be denied.

I. MOTION FOR NEW TRIAL

Under Rule 33, Fed.R.Crim.P., the Court, upon the motion of a defendant, "may grant a new trial to him if required in the interest of justice." In passing upon a motion for a new trial, a court must consider all of the

alleged errors which the defendant has raised, since Rule 33 "mandate[s] the broadest inquiry into the nature of the challenged proceeding." United States v. Narciso, 446 F.Supp. 252, 304 (E.D. Mich. 1977); 8A J. MOORE, FEDERAL PRACTICE ¶ 33.02[1] (1979). The motion, however, "is addressed to the sound discretion of the court" and "'the power [to grant a new trial] should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.'" United States v. Callahan, 442 F.Supp. 1213, 1229 (D. Minn. 1978) (quoting 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 553, at 487 (1969)).

Defendant has alleged several errors as providing grounds for a new trial. Defendant's motion begins with the allegation that the Court erred in admitting into evidence the out of court statements of co-defendant Astorino which implicated defendant. Defendant argues that Astorino's statements constituted

inadmissible hearsay. The Court finds no merit in this contention. As a general rule, an out of court declaration of a co-conspirator is admissible against a defendant if the government demonstrates (1) that a conspiracy existed; (2) that the defendant and declarant were members of the conspiracy; and (3) that the declaration was made during the course and in furtherance of the conspiracy. See United States v. Bell, 573 F.2d 1040 (8th Cir. 1978) and cases cited therein. The admissibility of an alleged co-conspirator's statement is a preliminary question for the Court to decide. Rule 104, Fed.R.Evid. In United States v. Bell, 573 F.2d at 1044, the Court of Appeals for the Eighth Circuit held:

> [A]n out of court statement is not hearsay and is admissible if on the independent evidence the district court is satisfied that it is more likely than not that the statement was made during the course and in furtherance of an illegal association to which the declarant and defendant were parties.

The Court finds that sufficient independent evidence existed to more than satisfy the mere preponderance standard set forth above as to the existence of a conspiracy. This conclusion is supported by tape recordings and by the testimony of government witness Jack Clark who, as an undercover agent, met with both Astorino and defendant on several occasions, during some of which there occurred sales of food stamps. A tape recording from April 9, 1980 (Exhibit 22) containing the conversations of Clark, defendant and Astorino provides evidence that defendant and Astorino acted as co-conspirators. Defendant introduced Clark to Astorino following Clark's telling defendant that he had food stamps that were for sale. Clark testified that he saw defendant hand Astorino the cash that was used for payment. Other evidence also suggests that defendant and Astorino acted as co-conspirators in the purchasing of food stamps. The August 6 tape (Exhibit 23) reveals that Astorino was about

to complete a transaction when defendant, having become suspicious that the transaction was being surveilled, prevented it from taking place. From this evidence the Court finds that the standard for admissibility has been satisfied. In reaching this conclusion the Court also finds that all of the Astorino statements admitted into evidence were made in furtherance of a conspiracy to purchase food stamps. Defendant raises no arguments in opposition to this finding.

Defendant next claims error in the Court's refusal to permit defendant to cross examine government witness Clark about his alleged misconduct prior to the time he became a government informant, and more particularly, Clark's statements concerning a great number of thefts and robberies for which he had not been charged or convicted.

At the outset it should be noted that the

Court possesses broad discretion regarding the admission of evidence. United States v. Bernhardt, 642 F.2d 251, 253 (8th Cir. 1981); United States v. Peltier, 585 F.2d 314, 332 (8th Cir. 1978). The defense was permitted to offer and did offer a wide range of impeaching evidence including Clark's three felony convictions, Clark's use of drugs and his reputation in the community. No less than four witnesses, three of whom were related to Clark, testified as to the bad character of Clark. These witnesses testified as to Clark's alleged drug use, his involvement in thefts, his threat to kill an unnamed person and his propensity to lie. Taken together this evidence was certainly adequate to convey the same impression which the excluded evidence sought to convey, i.e., that Clark was a pretty unsavory character. Thus, in the interests of time it was excluded.

Next defendant contends that it was error for the Court to admit evidence concerning the

events of August 6, 1980. Defendant is apparently referring to Clark's meeting with defendant and Astorino. Clark testified that he visited defendant's office; that he informed defendant that he (Clark) had food stamps for sale; that Astorino was then called to the office; that thereafter Astorino, Clark and defendant went out to the office parking lot; that defendant suddenly became suspicious that the transaction was being observed by law enforcement officials in a nearby van; and that thereupon, defendant refused to allow payment to be made saying he wanted Astorino to return the money he had given to him. This evidence was admitted to demonstrate defendant's knowledge of the transactions between Clark and Astorino. The probative value of the evidence outweighed any prejudice which it may have generated. This evidence served an important evidentiary purpose in that it tended to strengthen the link between Astorino and defendant as conspirators in the

purchasing of food stamps.

Next, defendant claims that it was error not to permit Special Agent Eichel to testify as to his opinion that Jack Clark was dangerous. The Court finds no merit in this claim. Defendant was afforded ample opportunity to impeach the character of Jack Clark and any further opinion evidence of his bad character was unnecessary insofar as it could have impacted on the jury's opinion of Clark and the truthfulness of his testimony.

The defendant further alleges that the Court erred in admitting tapes of certain conversations occurring on April 9, 1980 and on May 22, 1980 (Exhibits 22 and 23). In United States v. McMillan, 508 F.2d 101, 104 (8th Cir. 1974) the court listed the requirements which must be satsfied for the introduction of such evidence. Those requirements include a showing :

(1) That the recording device was capable of taking the conversation now offered in evidence.

(2) The the operator of the device was competent to operate the device.

(3) That the recording is authentic and correct.

(4) That changes, additions or deletions have not been made in the recording.

(5) That the recording has been preserved in a manner that is shown to the court.

(6) That the speakers are identified.

(7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

Defendant claims error with respect to all of the above requirements with the exception of (6). Again, the Court cannot find merit in defendant's claims. Clark testified that he was outfitted with the actual body recorder after observing the recorder being

tested in his presence by supervisory agents. Clark also testified that he was instructed how to turn the recorder on and off and that he understood the instructions. In addition, Clark stated that supervisory agents assumed responsibility for placing and removing the body recorders on both dates. Clark also indicated that he had reviewed the contents of Exhibits 22 and 23 and that he could identify them as recordings of conversations with defendant and Astorino that had occurred on the respective dates of April 9, 1980 and May 22, 1980. Although portions of Exhibits 22 and 23 were deleted, the defendant acknowledged that the deletions contained only those portions of the original recording that were determined by the parties to be irrelevant. Regarding (5) and (7) the Court finds that the tapes were properly preserved and that the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

Next, defendant alleges that the Court erred when defendant was not permitted to present evidence of various medical treatment received by Clark. This allegation also does not have merit. Rule 608(b), Fed. R.Civ.P., provides that specific instances of the conduct of a witness for the purpose of attacking or supporting his credibility, other than by conviction of a crime, may not be proved by extrinsic evidence. Although specific instances of conduct can be inquired into on cross examination, permission to conduct such inquiry is a discretionary matter for the Court. This discretion was not abused. The information sought by defendant was sensitive in nature and largely repetitive. As has been noted, the defense was permitted to present an ample quantity of evidence which served to accomplish the same goal which defendant sought to pursue via the evidence discussed here--namely,

impeachment of Clark's character. No valid purpose justified the admission of evidence pertaining to the various kinds of medical treatment Clark received.

Defendant also alleges that the Court committed error in refusing to give defendant's instruction No. 41 dealing with aiding and abetting. Defendant argues that the Court's instructions regarding the matter did not adequately cover the aiding and abetting offense. The Court's instructions on aiding and abetting contained in Nos. 37 and 38 are set forth nearly verbatim in Devitt and Blackmar, 1 Federal Jury Practice and Instructions § 12.03. The Court disagrees with defendant that this standard was inadequate.

The defendant next alleges that the Court erred in failing to give certain instructions which relate to specific intent crimes and in failing to instruct the jury that the defendant

must have committed the act alleged in Count I "willfully;" i.e., that he had specific intent to violate the law. Title 7 U.S.C. § 2024(b) does not require specific intent. For an offense to be committed under that statute, food stamps merely must be used, transferred or possessed knowingly; that is the user, transferee or possessor must be aware only that he is dealing in food stamps. Defendant has cited no contradictory authority. Consequently, the Court rejects defendant's claim of error.

Aiding and abetting a violation of Title 7 U.S.C. § 2024(b) similarly is not a specific intent crime since the substantive offense charged does not include specific intent as an element. See United States v. Bell, 573 F.2d at 1046. Because a violation of the above statute is not a specific intent crime, defendant's instructions were inappropriate and thus properly refused.

Defendant's next allegation of error concerns the Court's having overruled defendant's objections made during the closing argument of the government in which the government referred to defendant's "lying," and in which the government argued that it need only prove that defendant knew there were food stamps being transferred, and nothing more. The government was free to comment on defendant's testimony. The government also stated that it need only prove that defendant knew he was dealing in food stamps. The Court finds this statement of the law to be accurate, and accordingly finds no merit in defendant's claim.

Defendant next contends that the Court erred in retaining jurisdiction over the case owing to an alleged violation of defendant's right to due process of law. The Court finds no merit in this claim. Defendant's theory is based on two contentions: (1) that defendant was "hounded" by Clark, and (2) that the

government acted wrongfully in utilizing Clark as a witness and as an undercover agent in this investigation.

With respect to the first contention, defendant suggests that he was pressured into buying food stamps, and that the evidence shows that he (defendant) was not interested in making purchases. These contentions are not supported by the evidence. Although defendant testified that Clark told him that he needed to sell the food stamps because he was in a desperate situation, the Court cannot say that the use of this "sales pitch" induced Marvin's purchase. Evaluation of all the evidence suggests that the jury had support for its finding that the defendant acted voluntarily and deliberately. The tape recording of April 9, 1980 reveals that defendant was not coerced in any way. Rather the recording reveals that defendant helped take the initiative in bringing about

a purchase.

Regarding the evidence supporting defendant's second contention, the Court finds that the government's utilization of Clark as an informant did not constitute a violation of due process. It is often necessary to utilize informants who have criminal backgrounds. That the government's case relied in large part upon the testimony of a confessed drug user and felon does not provide grounds for a new trial. Thus, upon these findings the Court will deny defendant's motion for a post-trial hearing on this matter but as stated at the time sentence was imposed, the evidence developed in the Faltico case will be adopted in this case.

In its next allegation of error, defendant contends that dismissal of the indictment is warranted due to matters that occurred before the grand jury. Defendant makes two

claims (1) the grand jury did not receive full information regarding the investigation; and (2) the grand jury was mislead when it was informed that defendant was the subject of an "investigation." The Court finds no merit in these claims. With respect to the first claim, it is worthy of note that the government has broad discretion in deciding what evidence to present to a grand jury. There is no obligation to present all evidence that might be exculpatory or undermine the credibility of government witnesses. United States v. Smith, 595 F.2d 1176,1181 (9th Cir. 1979); United States v. Smith, 552 F.2d 257, 261 (8th Cir. 1977). With respect to defendant's second claim, the Court disagrees that the grand jury was mislead. The government did conduct an investigation which encompassed more than the mere utilization of Clark. Video and visual recordings as well as visual surveillance were also utilized for purposes of investigation.

To say that the government mislead the grand jury by airing testimony about an "investigation" of defendant is simply incorrect.

Regarding defendant's other allegations of error pertaining to the presigned indictment, the Court herein adopts the report and recommendation filed on August 19, 1981. As for defendant's allegations which challenge the defendant's guilt under the statute, the Court refers defendant to the Court's order of September 3, 1981.

II. ARREST OF JUDGMENT

Defendants have requested that, in the alternative, the Court arrest judgment pursuant to Rule 34, Fed.R.Crim.P. Rule 34 provides that the Court may arrest judgment only for two reasons: (1) if the indictment or information does not charge an offense, or (2) if the Court was without jurisdiction of the offense charged. Here defendant only invokes

the former. Defendant claims that the indictment was defective because it does not properly apprise him of the charges in Counts I, II, and III. Defendant contends that the indictment should have expressed the requirement that defendant had acted willfully in accordance with the provisions of 18 U.S.C. § 2. The Court finds no merit in this claim as it is clear that charges under the statute just cited need not be pleaded with the substantive offense in an indictment. United States v. Beardslee, 609 F.2d 914 (8th Cir. 1979). The case cited by defendant is inapposite to this case, United States v. Denmon, 483 F.2d 1093 (8th Cir. 1973). In Denmon, the indictment was found to be defective because the substantive offense was improperly pleaded as criminal intent was an essential element of the substantive offense. Aiding and abetting is not a separate offense which need be specifically charged. United States v.

Beardslee, supra.

III. JUDGMENT OF ACQUITTAL

Under Rule 29, Fed.R.Crim.P., a defendant may move the trial court to enter a judgment of acquittal on the charges against him "[i]f the jury returns a verdict of guilty or is discharged without having a verdict," and "if the evidence is insufficient to sustain a conviction." Id. Defendant has not argued that the evidence was insufficient to sustain a conviction, only that certain evidence should not have been admitted. Here, defendant merely reiterates objections which already have been considered and rejected. Because these objections cannot be deemed to have merit, defendant's motion must be denied.

In accordance with the foregoing memorandum, it is hereby

ORDERED that defendant's motion for a new trial is denied; and it is further

ORDERED that defendant's motion for arrest of judgment is denied; and it is further

ORDERED that defendant's motion for judgment of acquittal is denied.

/s/ Russell G. Clark

RUSSELL G. CLARK,
CHIEF JUDGE
UNITED STATES DISTRICT
COURT

Dated:. October 29, 1981

No. 82-990

In the Supreme Court of the United States

OCTOBER TERM, 1982

DR. JACK L. MARVIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erroneously instructed the jury regarding the requirement of intent for aiding and abetting a violation of 7 U.S.C. (Supp. V) 2024(b).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-33a) is reported at 687 F.2d 1221. The post-trial order of the district court (Pet. App. 34a-55a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1982 (Pet. App. 2a). An order denying rehearing (Pet. App. 1a) was entered on October 14, 1982. The petition for a writ of certiorari was filed on December 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted on one count of illegally acquiring and possessing food stamp coupons in violation of 7 U.S.C. (Supp. V) 2024(b),

and on two counts of aiding and abetting the illegal acquisition of food stamp coupons in violation of 7 U.S.C. (Supp. V) 2024(b) and 18 U.S.C. 2.[1] He was sentenced to concurrent terms of one year's imprisonment with all but 90 days suspended, to be followed by two years' probation, and he was fined $5000 on the first count. The court of appeals reversed the conviction on the first count, but affirmed the convictions on both of the aiding and abetting counts (Pet. App. 2a-33a).

1. The evidence as reflected in the opinion of the court of appeals showed as follows. Petitioner is a chiropractor in Kansas City, Missouri (Pet. App. 4a). In March 1980, petitioner was approached by Jackie Clark, an undercover investigator for the Department of Agriculture and a personal acquaintance of petitioner's. At that time, Clark invited petitioner to purchase food stamp coupons for substantially less than their face value (*id.* at 4a-5a).

On March 10, 1980, Clark took $500 worth of food stamps supplied to him by investigators at the Department of Agriculture into petitioner's office and returned with $200 in cash. Clark indicated that petitioner purchased those stamps himself directly from Clark (Pet. App. 5a). On April 9 and May 22, 1980, Clark again took food stamps to petitioner's office, but on those occasions petitioner merely helped arrange a sale of food stamps to co-defendant Anthony Astorino.[2] Petitioner provided cash for both purchases. Department of Agriculture agents taped both of those transactions (Pet. App. 6a).

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[1]Petitioner was acquitted on a fourth count of aiding and abetting under 7 U.S.C. (Supp. V) 2024(b) and 18 U.S.C. 2.

[2]Astorino was tried separately and convicted.

The district court instructed the jury that in order to convict petitioner on the substantive count of violating 7 U.S.C. (Supp. V) 2024(b),[3] it was required to find that petitioner's possession of the food stamps was done "knowingly" *i.e.*, "voluntarily and intentionally," and thus was not a mistake. The district court declined, however, to instruct the jury that it had to find that petitioner specifically intended to violate the law. With regard to the aiding and abetting counts, however, the court instructed the jury that it had to find that petitioner "willfully" participated in a crime, which it defined to mean "done voluntarily and intentionally, and with specific intent to do something the law forbids * * *" (Tr. 453).

2. The court of appeals affirmed in part and reversed in part (Pet. App. 2a-33a). It held that the district court erred in refusing to instruct the jury that 7 U.S.C. (Supp. V) 2024(b) is a specific intent crime and therefore reversed the conviction on the first count (Pet. App. 8a-19a).[4] The court held, however, that the jury had been given a proper specific intent instruction with regard to aiding and abetting the violation of Section 2024(b), and that there was ample evidence to support the jury's verdict on those two counts (Pet. App. 19a-20a).

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[3] 7 U.S.C. (Supp. V) 2024(b) provides in pertinent part:

> [W]hoever knowingly uses, transfers, acquires * * * or possesses [food stamp] coupons * * * in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons are of a value of $100 or more, be guilty of a felony.

[4] The court of appeals made clear that it was not holding that the evidence was insufficient to prove that petitioner had specific intent to violate 7 U.S.C. (Supp. V) 2024(b), and indeed noted that such intent could be readily inferred from the purchase of stamps "at a deep discount" as occurred in this case (Pet. App. 18a).

ARGUMENT

1. Petitioner contends (Pet. 8-18) that he was not properly convicted of aiding and abetting Astorino's acquisition of food stamps because the jury was not instructed that Astorino was required to have intended specifically to violate the law when he purchased the stamps. Further, he argues that the court of appeals erred in holding that the district court's instruction requiring the jury to find that petitioner had specific intent in order to convict him of aiding and abetting was sufficient.

The decision below does not conflict with any holdings of this Court or any other court of appeals, and the court's opinion does not discuss the issue raised by petitioner and thus is no precedent on this issue. Accordingly, the decision of the court of appeals is not a proper vehicle for deciding whether the failure to instruct regarding the specific intent of the principal is a bar to a conviction for aiding and abetting.

Petitioner claims (Pet. 12-13) that the decision below conflicts with this Court's decisions in *Standefer* v. *United States*, 447 U.S. 10 (1980) and *Shuttlesworth* v. *Birmingham*, 373 U.S. 262 (1963). Neither case, however, decided the issue he raises. In *Standefer* the Court, in affirming a conviction under Section 2 of 18 U.S.C., did point out that the government had proved beyond a reasonable doubt that the principal in that case had violated 26 U.S.C. 7214(a)(2). 447 U.S. at 26.[5] But the Court in discussing the jury instructions had no occasion to consider what instructions regarding the principal's intent were required in order to convict for aiding and abetting. See *id.* at 13 n.6.

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[5]Here too, the evidence amply supported the principal's guilt, and indeed he was convicted at a separate trial.

In *Shuttlesworth*, the Court held that there could be no aiding and abetting of an innocent act, but it did so in the context of a prior holding that the statute under which the principal had been convicted violated the First Amendment. Accordingly, the act in that case was plainly innocent; here there was ample evidence from which to conclude that the principal violated 7 U.S.C. (Supp. V) 2024(b). Thus, nothing in *Shuttlesworth* controls the result in this case.

Petitioner also asserts (Pet. 14-16) a conflict between the decision below and *United States* v. *Tashjian*, 660 F.2d 829 (1st Cir.), cert. denied, 454 U.S. 1102 (1981), and *United States* v. *Cleary*, 565 F.2d 43 (2d Cir. 1977). Both of those cases, however, involved a very different factual setting. In each case the court found that there was absolutely no evidence from which the requisite intent of the principal could be inferred and thus, following this Court's decision in *Shuttlesworth*, those courts held that a defendant cannot be convicted of aiding and abetting an innocent act. Neither court dealt with the issue of whether a specific intent instruction for the principal is required where the jury is instructed that it must find that the aider and abettor had guilty intent. Accordingly, there is no conflict with those decisions. Since the decision below is vague and concerns a situation unlike that presented in any cases cited by petitioner, and the situation here is not likely to recur,[6] it does not warrant further review by this Court.

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[6]It is largely fortuitous that there is even an issue of the principal's intent in this case. It is settled that under 18 U.S.C. 2(b), which includes within the term aiding and abetting acts done by one who willfully causes another to commit a crime, the principal need not have criminal intent. See *United States* v. *Ruffin*, 613 F.2d 408, 413 (2d Cir. 1979); *United States* v. *Gleason*, 616 F.2d 2, 20 (2d Cir. 1979), cert. denied, 444 U.S. 1082 (1980); *United States* v. *Rucker*, 586 F.2d 899, 905 (2d Cir. 1978); *United States* v. *Rapoport*, 545 F.2d 802, 806 (2d Cir. 1976), cert. denied, 430 U.S. 931 (1977); *United States* v. *Kelner*, 534 F.2d

2. Petitioner next claims (Pet. 18-24) that there was an ambiguity in the instructions on aiding and abetting in respect to specific intent. This contention proceeds from two premises. First, petitioner points out (Pet. 21) that the instructions did not require the jury to find specific intent with respect to the Count One charge. Second, he notes (Pet. 22) that the district court opened its discussion of aiding and abetting by instructing that participation in an offense is willful if "done voluntarily and intentionally" (Tr. 453), which was the same language used in the instruction on the substantive offense. From this, he concludes that the jury would logically have believed that the scienter elements of the two offenses were the same and that a finding of knowledge of illegality was not required for either.

The district court, however, fully defined the willfulness element of aiding and abetting by instructing that an act is done willfully if done "with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law" (Tr. 453). The jury was thus clearly informed that the scienter element of aiding and abetting included knowledge of illegality. If there was any potential for confusion in the instruction, the jury would have been just as likely to have believed that knowledge of illegality was an element of the Count One offense as well as of the aiding and abetting offenses. In any event, the court expressly instructed the jury that each count involves "[a]

1020, 1022 (2d Cir.), cert. denied, 429 U.S. 1022 (1976); *United States* v. *Bryan*, 483 F.2d 88, 92-94 (3d Cir. 1973); *United States* v. *Lester*, 363 F.2d 68, 72-73 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967). As the court explained in *Lester*, the willfulness of a causer is joined with the act of an innocent intermediary to form, in respect to the causer, the "joint operation of act, or failure to act, and intent" prerequisite to the commission of a crime. 363 F.2d at 73. Thus, in most cases where this problem arises and the aider and abettor has specific intent, the issue can be avoided simply by instructing under Section 2(b).

separate crime or offense" and that "[e]ach charge * * * should be considered separately" (Tr. 448). Accordingly, it is most unlikely that the jury confused the two sets of instructions.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1983

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[7]Petitioner also claims (Pet. 25) that the jury could have believed that he was charged in the second and third counts as a principal (and hence was subject to a lesser scienter requirement) because the district court instructed that he was "charged in four counts of violations of 7 U.S.C. 2024(b)" (Tr. 449-450). Earlier, however, the court had read each of the four counts to the jury, including the statutory citations (Tr. 445-447). The first count charged petitioner alone, and the remaining three counts charged petitioner together with Astorino, and cited 18 U.S.C. 2. In light of the court's extended discussion of aiding and abetting and the fact that the proof unambiguously showed that the person who actually received the stamps charged in the second and third counts was Astorino and not petitioner, the court of appeals correctly held that "it is clear in context that [petitioner] was not charged in these two counts with acquiring or possessing food stamps himself, but rather with helping someone else to do so" (Pet. App. 19a).

DOJ-1983-03